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IN THE

Supreme Court of the United States

KEYSE G. JAMA,

Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF *AMICI CURIAE* OF INTERNATIONAL HUMAN RIGHTS ORGANIZATIONS AND INTERNATIONAL LAW PROFESSORS IN SUPPORT OF THE PETITIONER

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STATEMENT OF INTEREST[1]

Amici curiae submit this brief in support of petitioner. *Amici* are international human rights organizations and international law professors specializing in human rights law. Amnesty International USA is the U.S. arm of Amnesty International, a worldwide grassroots organization committed to promoting and defending human rights. The Center for Constitutional Rights is a non-profit legal organization dedicated to advancing and protecting the rights guaranteed by the Constitution of the United States and the Universal Declaration of Human Rights. Human Rights Watch is the largest U.S.-based international human rights organization and investigates and reports violations of fundamental human rights in over 70 countries worldwide with the goal of securing those rights for all individuals. The international law professors are: William J. Aceves (California Western School of Law); Deborah E. Anker (Harvard Law School); Douglass W. Cassel, Jr. (Northwestern University School of Law); Jenny S. Martinez (Stanford Law School); James J. Silk (Yale Law School); Beth Van Schaack (Santa Clara University School of Law); and David Weissbrodt (University of Minnesota Law School).[2] *Amici* are committed to promoting the recognition and enforcement of international human rights law and to focusing attention on its application to U.S. immigration law and policy.

SUMMARY OF ARGUMENT

When a country lacks a functioning central government, basic human rights cannot be enforced. Such is the current situation in Somalia. Since the outbreak of civil war in 1991, competing clans have battled for control of various parts of the country, and Somalia has come to resemble what Thomas Hobbes described over four centuries ago: a place of "continual

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[1] Pursuant to Rule 37.6, *amici curiae* certify that no counsel for a party authored this brief in whole or in part and that no person or entity, other than *amici*, or their counsel, has made a monetary contribution to its preparation or submission. Letters of consent by the parties to the filing of this brief have been lodged with the Clerk of this Court.

[2] Affiliations of *amici* international law professors are listed for identification purposes only.

fear, and danger of violent death; and the life of man, solitary, poor, nasty, brutish, and short."[3]

Amici submit this brief in support of petitioner's claim that the United States may not presently deport him to Somalia. As the United States concedes, Somalia has no government that can accept petitioner's return. Until the court of appeals' decision below, *Jama v. INS*, 329 F.3d 630 (8th Cir. 2003), federal courts had uniformly construed the relevant removal statute, 8 U.S.C. § 1231(b)(2) (and its predecessor 8 U.S.C. § 1253(a)), to require that a foreign government accept an alien as a condition precedent to his deportation. The Solicitor General, however, contends that this statute imposes no impediment to petitioner's return to Somalia when there is no government to accept him, even though news reports describe "people being killed at the very airport where the INS [had sought] to drop [him]."[4] In the respondent's view, a statutory acceptance requirement serves no purpose unless there is another government "that would be offended by our [government's] return of an alien . . . without consent."[5]

The United States' commitment to protecting human rights and obligations under international law support a different conclusion, and, for the reasons summarized below, this Court should construe § 1231(b)(2) to prohibit petitioner's return to Somalia under the current circumstances.

1. On the threshold issue of jurisdiction, the court of appeals correctly decided that the district court had habeas corpus jurisdiction to review petitioner's claim.

2. This Court has long recognized that international law, as embodied in treaties and customary international law, is part of the law of the United States and that, where possible, federal statutes should be construed to avoid violating the law of nations.

3. International human rights law depends principally on states for its implementation and enforcement. As the current

[3] Thomas Hobbes, *Leviathan* 89 (1651) (Richard Tuck ed., 1991).

[4] Pet'n for Writ of Cert. at 6 (internal quotation marks and citation omitted).

[5] Br. for Resp.-Appellant to the Eighth Circuit at 44.

conditions in Somalia demonstrate, when a state has no functioning central government, international human rights law cannot be enforced. In light of the United States' commitment to fostering the system of international human rights, and its obligations by virtue of its membership in the United Nations and ratification of the U.N. Charter, this Court should interpret § 1231(b)(2) to prevent petitioner's deportation to Somalia until it has a functioning central government that accepts his return and can enforce human rights protections throughout its territory.

4. Under the International Covenant on Civil and Political Rights ("ICCPR"), Dec. 16, 1966, 999 U.N.T.S. 171, ratified by the United States on June 8, 1992, the United States cannot deport an alien to another country if there is a real risk that he will be subjected to torture or to cruel, inhuman, or degrading treatment or punishment. The United States' duty to make this assessment is critical before returning anyone to Somalia, given Somalia's lack of a functioning central government and what the Department of Homeland Security has itself described as "an atmosphere of lawlessness" and "ongoing armed conflict" that would "pose a serious threat to the[] personal safety" of any Somali national returned there.[6] This assessment has not been made in petitioner's case, and § 1231(b)(2) should thus be construed to prevent his return to Somalia until the United States has determined that it will not violate its *nonrefoulement* obligation under the ICCPR.

ARGUMENT

I. THE DISTRICT COURT PROPERLY EXERCISED HABEAS JURISDICTION

In the court of appeals, the government contested the district court's habeas corpus jurisdiction over petitioner's claim. *Amici* briefly address why the court of appeals correctly found habeas jurisdiction and submit that the federal courts must adjudicate an alien's challenge to his removal from the United States to ensure that U.S. immigration laws are

[6] Extension of the Designation of Somalia under Temporary Protected Status Program, 68 Fed. Reg. 43,147, 43,148 (July 21, 2003) ("Somalia TPS").

construed in accordance with U.S. obligations under international law.

The court of appeals correctly held that the district court properly exercised habeas jurisdiction on the ground that: (1) "substantial constitutional questions" would be raised if petitioner's "pure question of law" were not reviewable in *some* court; (2) petitioner's statutory claim could not be brought directly in the court of appeals because the Immigration and Nationality Act ("INA") bars petition-for-review jurisdiction where the alien is removable based on criminal convictions enumerated in 8 U.S.C. § 1252(a)(2)(C); and (3) no provision of the INA expressly repealed 28 U.S.C. § 2241 habeas jurisdiction and the scope of habeas corpus review encompasses questions of statutory interpretation. *Jama*, 329 F.3d at 632-33.

The court of appeals correctly found that 8 U.S.C. § 1252(a)(2)(C) bars petition-for-review jurisdiction over petitioner's claim because he is removable based on a criminal conviction (a crime of moral turpitude) enumerated in that provision. 329 F.3d at 632. *See Calcano-Martinez v. INS*, 533 U.S. 348, 351 (2001) (alien conceding removabality on the basis of criminal offense enumerated in § 1252(a)(2)(C) may not raise a statutory claim relating to final order of removal by petition for review).[7]

The court of appeals also correctly held that none of the INA's jurisdiction-stripping provisions divested the district court of § 2241 habeas jurisdiction because those provisions do not mention explicitly, much less repeal, the habeas statute. *INS v. St. Cyr*, 533 U.S. 289, 298-99, 308-15 (2001) (applying express statement rule and finding § 2241 habeas jurisdiction);

[7] In addition, the claim raised by petitioner could not be raised in a petition for review even where the alien is not removable on the basis of a criminal conviction. The claim does not allege an error in the final order of removal, but rather that the Attorney General may not enforce deportation to Somalia *until* Somalia has a functioning government. That claim arises only when the Attorney General actually seeks to enforce removal, and thus only after administrative and judicial proceedings have been completed. Thus, the claim presented here must be brought in habeas when, and if, the Attorney General seeks to deport an individual to a country whose conditions *at the time of actual deportation* render it an illegal removal destination under the INA.

Demore v. Kim, 538 U.S. 510, 517 (2003) (same).[8] Moreover, while the Constitution does not require that review of petitioner's claim occur by any particular mechanism or in any particular court, *St. Cyr*, 533 U.S. at 314 n.38, a preclusion of *all* federal review over that pure legal claim would violate the Suspension Clause of the U.S. Constitution. *St. Cyr*, 533 U.S. at 300-01. At an absolute minimum, *St. Cyr* makes clear that "substantial constitutional questions" would be raised by the preclusion of all such review. *Id.* at 300. Review of petitioner's claim by habeas corpus avoids that constitutional problem.

Finally, under article 13 of the ICCPR, *supra*, aliens may be deported only after a "competent authority" has heard their claims against deportation and reached "a decision in accordance with law." Moreover, aliens must be allowed to challenge their deportation[9] and must have an "effective" remedy against unlawful removal.[10] Habeas review of petitioner's claim satisfies these requirements.

[8] The court of appeals noted, 329 F.3d at 632-33, that *St. Cyr* found it unnecessary to address whether the language of 8 U.S.C. § 1252(g) repealed habeas jurisdiction because that provision applies only to three discrete actions by the Attorney General — the decision to commence proceedings, adjudicate cases, or execute final removal orders — and not to challenges to the validity of a removal order itself. *See St. Cyr*, 533 U.S. at 311 n.34. The court of appeals properly concluded that § 1252(g), like the jurisdiction-stripping provisions at issue in *St. Cyr*, could not repeal § 2241 habeas jurisdiction because it also lacked the express directive necessary to effectuate such a repeal. 329 F.3d at 632-33. Furthermore, the court of appeals found that petitioner's legal claim fell "outside the scope" of § 1252(g) because that section applies only to "discretionary" claims. *Id.* at 632. Thus, even if *St. Cyr's* express statement rule did not so plainly preclude § 1252(g) from repealing § 2241 habeas jurisdiction, § 1252(g) would not bar petitioner's non-discretionary claim under 8 U.S.C. § 1231(b)(2).

[9] *E.g.*, *Hammel v. Madagascar*, Views of the H.R. Comm. under art. 5, ¶ 4 of the Optional Protocol to the ICCPR, Comm. No. 155/1983, 29th Sess., U.N. Doc. CCPR/C/29/D/155/1983 (1987).

[10] *Giry v. the Dominican Republic*, Views of the H.R. Comm. under art. 5, ¶ 4 of the Optional Protocol to the ICCPR, Comm. No. 193/1985, 39th Sess., U.N. Doc. CCPR/C/39/D/193/1985 (1990).

II. FEDERAL STATUTES SHOULD BE INTERPRETED TO COMPLY WITH UNITED STATES' COMMITMENTS UNDER INTERNATIONAL LAW

International law, as embodied in both treaty and customary law, is part of the law of the United States. Under the Constitution, international treaties are the supreme law of the land. U.S. Const. art. VI, cl. 2 ("all Treaties, made or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land"). Customary international law is also part of the law of this nation. *The Paquete Habana*, 175 U.S. 677, 700 (1900); *Restatement (Third) of the Foreign Relations Law of the United States* § 111 cmt. e (1987) ("*Restatement (Third)*") ("Cases arising under treaties to which the United States is a party, as well as cases arising under customary international law . . . [are] within the Judicial Power of the United States under Article III, Section 2 of the Constitution.").

Moreover, the United States' membership in the United Nations and ratification of the U.N. Charter require it to cooperate with other nations "in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction."[11] Indeed, the U.S. has repeatedly declared its intention to promote and protect human rights. *E.g.*, Implementation of Human Rights Treaties, Exec. Order No. 13,107, 63 Fed. Reg. 68,991 (Dec. 10, 1998)

> It shall also be the policy and practice of the Government of the United States to promote respect for international human rights, both in [the United States'] relationships with all other countries and by working with and strengthening the various international mechanisms for the promotion of human rights, including . . . those of the United Nations . . . .

See also U.S. Dep't of State, *2002 Country Reports on Human Rights Practices*, Preface (2003) ("human rights are universal"

[11] Charter of the United Nations ("U.N. Charter"), art. 1(3), June 26, 1945, 59 Stat. 1031, 3 Bevans 1153, ratified by the United States on August 8, 1945.

and "their protection worldwide serves a core U.S. national interest").

Federal statutes should be interpreted and applied in accordance with international law, as "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains." *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) (Marshall, C.J.); *see also Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 814-15 (1993) (quoting *Charming Betsy* and labeling the principle a "canon of statutory construction"). This principle applies with particular force to statutory constructions that would otherwise lead to a violation of international human rights laws. For the reasons described below, this Court should interpret § 1231(b)(2) to prevent petitioner's deportation to Somalia under the current circumstances.

III. SECTION 1231(b)(2) SHOULD BE INTERPETED TO PREVENT PETITIONER'S REMOVAL TO SOMALIA UNTIL IT HAS A FUNCTIONING CENTRAL GOVERNMENT THAT ACCEPTS HIS RETURN AND CAN ENFORCE THE FUNDAMENTAL PROTECTIONS GUARANTEED UNDER HUMAN RIGHTS LAWS

A. International Human Rights Laws Cannot Be Adequately Enforced without a Functioning Central Government

The basic protections codified in international human rights law depend primarily on states for their implementation and enforcement.[12] These protections, as codified in the ICCPR, *supra*, include the: right to life (art. 6); right to be free from torture or cruel, inhuman, or degrading treatment or punishment (art. 7); right not to be subjected to arbitrary arrest and detention (art. 9); right to a fair hearing when accused of

[12] This brief discusses international human rights law, which refers to the body of law guaranteeing the rights of individuals with respect to the state, and which is distinct from international humanitarian law, the body of law governing the conduct of state and non-state actors in international and internal armed conflict. *Situation of Human Rights in Somalia, Report of the Special Rapporteur*, U.N. ESCOR, 55th Sess., U.N. Doc. E/CN.4/1999/103, ¶¶ 33-34 (1999) ("*Situation of Human Rights in Somalia (1999)*") (all parties to conflict in Somalia are bound by Common Article 3 to the four Geneva Conventions of August 12, 1949).

a criminal offense (art. 14); and right to equality before the law (art. 26).

Amici are well aware that governments are often egregious violators of human rights and that the existence of a functioning central government does not alone guarantee that human rights laws will be enforced. However, as the conditions in Somalia demonstrate, the absence of any such government or other competent authority necessarily means that they will not be enforced. *E.g., Jama*, 329 F.3d at 637 (Bye, J., dissenting) (by expelling petitioner to Somalia "we abandon a stateless person without a passport or traveling documents in a war-torn country victimized by battling warlords, and without a central government"); *Ali v. Ashcroft*, 346 F.3d 873, 885 (9th Cir. 2003) (government never "challenge[d] the assertion that [nationwide class of Somalis] would be subject to human rights abuses if removed to Somalia").[13] For this reason, and in light of the United States' commitment to upholding the system of international human rights based on its membership in the United Nations and ratification of the U.N. Charter, this Court should interpret § 1231(b)(2) to prohibit petitioner's deportation to Somalia until it has a functioning central government that accepts his return and can enforce basic human rights laws throughout its territory.

1. International Law Requires the Existence of a Functioning Central Government To Enforce Human Rights Protections

Protecting human rights has been one of the central goals of the international legal system for over half a century. The 1945 Charter of the United Nations, ratified by virtually every nation in the world, proclaimed the promotion of human rights and fundamental freedoms as one of the United Nations' main purposes.[14] The protection of human rights is acknowledged

[13] This still does not absolve non-state actors such as militias and local civilian authorities of their obligations to respect human rights and, in particular, not to commit war crimes in Somalia. *See, e.g., Situation of Human Rights in Somalia* (1999), *supra*, ¶¶ 33-34.

[14] U.N. Charter, *supra*, art. 1(3). There are presently 191 members of the United Nations. *See Status of Multilateral Treaties Deposited with the Secretary General, available at* <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/bible.asp> (as of May 14, 2004).

by nearly all nations as the "first responsibility of Governments"[15] and forms an internationally recognized core of "obligations owed by all governments to their citizens."[16]

Like international law generally, human rights law operates on the principle that a state with a functioning central government enters into treaties to enforce "rights and obligations among [states]."[17] For the last half-century, treaties have connected almost every state in an effort to secure human rights, and the number of signatories and parties to these various multilateral human rights treaties underscores the breadth of this common commitment.[18] These treaties are

[15] U.N. World Conference on Human Rights, *Vienna Declaration and Programme for Action*, adopted June 25, 1993, U.N. Doc. A/CONF.157/24 (Part I), at 20-46 (Oct. 13, 1993), *reprinted in* 32 I.L.M. 1661, 1664-65 (1993).

[16] *Filartiga v. Peña-Irala*, 630 F.2d 876, 884 (2d Cir. 1980) (internal quotation marks and citation omitted); *see also* Louis Henkin, "Evolving Concepts of International Human Rights and the Current Consensus," Paper Presented at the International Human Rights Session, Judicial Conference – Second Judicial Circuit of the United States (June 15, 1996), *reprinted in* 170 F.R.D. 201, 264 (1997) ("How a nation treats its own inhabitants is now everybody's business, potentially.").

[17] Louis Henkin, "The Constitution and United States Sovereignty: A Century of Chinese Exclusion and its Progeny," 100 *Harv. L. Rev.* 853, 864 (1987); *see Restatement (Third), supra*, § 201 (defining state as "entity that has a defined territory and a permanent population, under the control of its own government, and that engages in, or has the capacity to engage in, formal relations with other such entities"); The Montevideo Convention on Rights and Duties of States, art. 1, Dec. 26, 1933, 49 Stat. 3097, 165 L.N.T.S. 19 ("The state as a person of international law should possess," *inter alia*, a "government" and "capacity to enter into relations with the other states."); *see generally* J.L. Brierly, *The Law of Nations: An Introduction to the International Law of Peace* 1 (Humphrey Waldock ed., 6th ed. 1963) (defining international law as "the body of rules and principles of action which are binding upon civilized states in their relations with one another").

[18] *See, e.g.*, Convention on the Prevention and Punishment of the Crime of Genocide ("Genocide Convention"), Dec. 9, 1948, 78 U.N.T.S. 277, ratified by the United States on Nov. 25, 1988 (41 signatories and 135 parties); International Convention on the Elimination of All Forms of Racial Discrimination ("CERD"), March 7, 1966, 660 U.N.T.S. 195, ratified by the United States on Oct. 21, 1994 (84 signatories and 169 parties); International Covenant on Economic, Social and Cultural Rights ("ICESCR"), Dec. 16, 1966, 993 U.N.T.S. 3, signed by the United States on Oct. 5, 1977 (Cont'd)

entered into by national governments, which, in turn, are bound to enforce them throughout their respective countries.

The basic international human rights regime thus imposes affirmative obligations on governments to implement and enforce the rights guaranteed to individuals. For example, the ICCPR requires states parties "to respect and to *ensure* to all individuals" its various safeguards, ICCPR, *supra*, art. 2(1) (emphasis added), including the protection against torture or cruel, inhuman, or degrading treatment or punishment. *Id.* art. 7. This duty requires that states not only protect individuals from official action but also "take positive measures" to safeguard them from private interference with their human rights,[19] such as the right to life, ICCPR, *supra*, art. 6, and the right to personal security. *Id.* art. 9.[20] Similarly, the Convention Against Torture ("CAT") commands states parties "to *ensure* that all acts of torture are offences under [their] criminal law,"[21] while the Genocide Convention requires states to "undertake to *prevent and to punish* [genocide]."[22]

(Cont'd)

(65 signatories and 149 parties); ICCPR, *supra* (67 signatories and 152 parties); Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT"), Dec. 10, 1984, 1465 U.N.T.S. 85, ratified by the United States on Oct. 2, 1994 (74 signatories and 136 parties). *See generally Status of Multilateral Treaties Deposited with the Secretary-General*, *supra* (listing signatories and parties).

[19] Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* ¶ 20, at 38 (1993) ("*CCPR Commentary*").

[20] *See W. Delgado Paéz v. Colombia*, Views of the H.R. Comm. under art. 5, ¶ 4 of the Optional Protocol to the ICCPR, Comm. No. 195/1985, 39th Sess., U.N. Doc. CCPR/C/39/D/195/1985 (1990) (ICCPR's guarantee of right to security was violated where Columbian government had failed to take appropriate measures to protect applicant against anonymous death threats and attacks that ultimately caused him to flee the country).

[21] CAT, *supra*, art. 4(1) (emphasis added).

[22] Genocide Convention, *supra*, art. 1 (emphasis added); *see also* CERD, *supra*, art. 5 ("States Parties *undertake to prohibit* and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law . . . .") (emphasis added).

Regional human rights treaties likewise impose affirmative duties on states parties to ensure that an individual's human rights are protected. *E.g.*, European Convention for the Protection of Human Rights and Fundamental Freedoms ("European Convention"), art. 1, Nov. 4, 1950, 213 U.N.T.S. 221, E.T.S. 5 (as amended through Nov. 1998) ("[State] Parties *shall secure to everyone within their jurisdiction* the rights and freedoms [guaranteed under the] Convention.") (emphasis added).

Customary international law[23] also obligates states to prohibit and protect against human rights abuses, such as slavery, genocide, torture, or cruel, inhuman, or degrading treatment or punishment. *E.g.*, *Restatement (Third)*, *supra*, § 702 ("state violates international law if, as a matter of state policy, it practices, encourages, or condones [*inter alia*, genocide, slavery, murder, torture, cruel, inhuman, or degrading treatment or punishment, and apartheid]"); *Filartiga v. Peña-Irala*, 630 F.2d 876, 884 (2d Cir. 1980) (recognizing prohibition against torture as customary international law); *see also Barcelona Traction, Light and Power Co. (Belg. v. Spain)*, 1970 I.C.J. 3, 33-34 (Feb. 5) (obligation of states to prohibit certain acts, such as aggression, genocide, and those concerning the "basic rights of the human person, including protection from slavery and racial discrimination," is *erga omnes*, and thus reflects a state's obligation "towards the international community as a whole").[24]

Thus, the system of international human rights law that has developed over the last half-century has been based upon the belief that states with functioning central governments are responsible for enforcing human rights within their respective territories. As the situation in Somalia demonstrates, when no

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[23] Customary international law is a body of rules that states universally abide by "from a sense of legal obligation." *Restatement (Third)*, *supra*, § 102(2); *see also The Paquete Habana*, 175 U.S. at 700 ("where there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations").

[24] Customary international law also directly regulates the conduct of individuals, prohibiting acts of piracy, genocide, slavery, and torture. *See generally* Steven R. Ratner et al., *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy* 80-124 (2d ed. 2002).

such government exists, even the most basic human rights protections cannot adequately be secured.

2. Somalia Lacks a Functioning Central Government

Somalia is not merely the *only* country in the world without a government, but it has also been without one for over thirteen years, since the dictator Mohamed Siad Barre fled the country amid protests against his rule in January 1991. As the internationally recognized Somalia expert Kenneth Menkhaus recently observed, "Somalia's inability to preserve even a minimal figleaf of central administration over twelve years puts it in a class by itself among the world's failed states."[25] It is, he concluded, "a failure among failed states."[26] Indeed, the U.N. Security Council, of which the United States is a permanent member,[27] has repeatedly stated that the situation in Somalia is so grave that it "constitutes a threat to international peace and security in the region."[28]

The closest Somalia has come to a national government since 1991 was the formation of the Transitional National Government ("TNG") in August 2000. The TNG, however, has never controlled Somali territory beyond a part of the capital, Mogadishu,[29] nor has it ever established even the most basic services for the Somali population.[30] The United States has no

[25] Kenneth Menkhaus, "State Collapse in Somalia: Second Thoughts," 3 *Rev. Afr. Pol. Econ.* 405, 407 (2003).

[26] *Id.*; *see generally* Jennifer Moore, "From Nation State to Failed State: International Protection from Human Rights Abuses by Non-State Agents," 31 *Colum. Hum. Rts. L. Rev.* 81, 84 n.6 (1999) (describing characteristics of failed states).

[27] U.N. Charter, art. 23(1). The Security Council's primary responsibility is to maintain "international peace and security" in accordance with the principles and purposes of the United Nations. *Id.* art. 24(1).

[28] S.C. Res. 1519, U.N. SCOR, 4885th mtg., U.N. Doc. S/RES/1519 (Dec. 16, 2003).

[29] UNHCR, *Somalia: A Situation Analysis and Trend Assessment* (2003) ("*Somalia: A Situation Analysis*").

[30] The Danish Immigration Service, *Human Rights and Security in Central and Southern Somalia* (*Joint Danish, Finnish, Norwegian, and British Fact-Finding Mission*) 6 (Mar. 2004).

diplomatic relations with the TNG or any other entity in Somalia, maintains no embassy in Somalia, and has no consular relations in Somalia.[31]

The absence of a functioning central government has hindered the implementation of the United Nations embargo on the delivery of weapons and military equipment to Somalia since it went into effect in 1992. Indeed, the U.N. Security Council has been precluded from even addressing its concerns to any authority in Somalia. Instead, the Security Council has had repeatedly to implore "all Somali . . . parties" to cooperate fully with its Monitoring Group.[32]

Thus, for the past thirteen years Somalia has lacked a functioning central government. It has effectively become a failed state, embroiled in ongoing conflict among competing clans, sub-clans, and factions, and without any authority capable of enforcing human rights protections.[33]

3. The Prolonged Absence of a Functioning Central Government in Somalia Has Deprived Somalis of Protection of Their Most Basic Human Rights

Reports from Somalia confirm that the human rights and public security situation continues to deteriorate.[34] Amnesty International states that "rights have been systematically violated without any possibility of legal redress."[35] In a

[31] U.S. Dep't of State, Bureau of African Affairs, *Background Note: Somalia* (Oct. 2003), *available at* <http://www.state.gov/r/pa/ei/bgn/2863.htm> ("Somalia has been without a central government since 1991, and much of the territory has been subject to serious civil strife. There is no official U.S. representation in Somalia.").

[32] S.C. Res. 1519, *supra*, ¶ 4; S.C. Res. 1474, ¶ 6, U.N. SCOR, 4737th mtg., U.N. Doc. S/RES/1474 (Apr. 8, 2003).

[33] *E.g.*, Guy S. Goodwin-Gill, *The Refugee in International Law* 76 (2d ed. 1996) (describing Somalia as a conflict in which "competing clans, sub-clans and factions compete amongst themselves, but none emerges as an authority in fact").

[34] Menkhaus, "State Collapse in Somalia," *supra*, at 13 ("Somalia today is gripped by more insecurity and armed clashes than at any time since 1996.").

[35] Amnesty International, *Somalia: No Lasting Peace Without Human Rights* 1 (2002).

territory long without any central authority to enforce the rule of law, it has become "easy for small numbers of individuals and groups to incite armed clashes."[36] In 2003, there were numerous cases of rape, including the rape of children, and widespread abductions and savage killings of women.[37] Somalia's best-known human rights organization, the Dr. Ismael Jumale Human Rights Center, documented 530 civilian deaths in armed conflicts between July 2002 and June 2003. As the United Nations High Commissioner for Refugees ("UNHCR") recently reported, "throughout the country, human rights violations remain endemic . . . [including] murder, looting and destruction of property, use of child soldiers, kidnapping, discrimination of minorities, torture, unlawful arrest and detention, and [the] denial of due process by local authorities ."[38]

The U.S. government's assessment of conditions in Somalia is equally bleak. Since September 1991, it has annually renewed Temporary Protected Status ("TPS") for Somalis in the United States (most recently extended through September 2004),[39] based on its determination that the "ongoing armed conflict . . . would pose a serious threat to the[] personal safety" of those returned to Somalia.[40] Indeed, the Department of Homeland Security ("DHS") recently underscored that "[m]ajor regions of the country are under the control of bandits and the population is beyond the reach of the rule of law."[41] Notably, while DHS has authority to limit a TPS designation to part of a foreign state, the designation for Somalia covers

[36] *Id.; see also* The Danish Immigration Service *supra*, at 11 ("overall security and human rights situation in Somalia [has] deteriorated to an extent not seen for some years") (quoting representative of international organization in southern Somalia).

[37] Danish Immigration Service, *supra*, at 11.

[38] UNHCR, *Position on the Return of Rejected Asylum Seekers to Somalia* 2 (Jan. 2004) ("*Position on the Return of Rejected Asylum Seekers to Somalia*").

[39] Somalia TPS, *supra*, 68 Fed. Reg. at 43,147.

[40] *Id.* at 43,148. Petitioner's criminal conviction, however, rendered him ineligible for TPS status. 8 U.S.C. § 1254(c)(2)(B).

[41] Somalia TPS, *supra*, 68 Fed. Reg. at 43,147.

the entire country.[42] The U.S. State Department continues to document the grave risks to personal safety in Somalia, recently finding, for example, that "police and militia members committed numerous, serious human rights abuses throughout the country" and that prison conditions continue to be "harsh and life threatening."[43]

Mogadishu remains dangerous and divided, with rival clans fighting for control over various parts of the city.[44] Kidnapping for ransom has become increasingly prevalent in Mogadishu,[45] and at least 185 people were abducted there last year.[46] Any person believed to have money, or access to money, makes a particularly attractive target, including businessmen, school children of wealthy parents, and Somalis who have returned from abroad.[47] In fact, returnees are at particular risk of being robbed, extorted, or attacked by militias throughout the country because they are widely perceived to have wealth[48] and to lack any clan or family,[49] now the main source of protection in the absence of a functioning central government.

The lack of effective government and rampant violence have combined to deprive the Somali population of even the most basic services and have made the humanitarian situation there among the worst in the world. The situation has deteriorated considerably during the last thirteen years. In 1996, Somalia ranked 172 out of 174 countries on the Human

[42] *Id.*

[43] U.S. Dep't of State, *Country Reports on Human Rights Practices 2003, Somalia* 1 (2004) ("*U.S. Country Reports on Human Rights: Somalia*"). The State Department has not noted any improvement in human rights conditions in Somalia since issuing its most recent report.

[44] The Danish Immigration Service, *supra*, at 6.

[45] *Position on the Return of Rejected Asylum Seekers to Somalia, supra*, at 1.

[46] *U.S. Country Reports on Human Rights: Somalia, supra*, at 3.

[47] The Danish Immigration Service, *supra*, at 21.

[48] *Id.* at 44.

[49] *Position on the Return of Rejected Asylum Seekers to Somalia, supra*, at 8.

Development Index ("HDI"),[50] which measures a country's average achievements in the three basic categories of human development.[51] Since then, Somalia has been excluded from the HDI altogether because the U.N. Development Programme has not been able even to collect the necessary data amid the highly volatile situation in that country. Without a functioning central government in Somalia, not even this basic information can be securely gathered.

B. Victims Have No Remedy for Human Rights Abuses without a Reliable Legal System

1. A Reliable Legal System Is Necessary To Remedy Human Rights Abuses

Under international law, states must provide a remedy for human rights violations. The ICCPR, for example, requires that states parties take the necessary measures to ensure that victims of human rights violations "have an effective remedy" against the violators through the appropriate "judicial, administrative, or legislative authorities." ICCPR, *supra*, art. 2(3). States are thus obliged to take positive steps to "safeguard" these rights by creating a functioning legal system with the necessary procedural guarantees.[52]

Similarly, the Convention Against Torture explicitly requires each state party to guarantee that its appropriate authorities promptly and impartially investigate torture allegations[53] and to "ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation."[54] But without the

[50] *Situation of Human Rights in Somalia, Report of the Independent Expert*, U.N. ESCOR, 60th Sess., U.N. Doc. E/CN.4/2004/103, at 12 (2003) ("*Situation of Human Rights in Somalia (2003)*").

[51] Those categories are: life expectancy at birth; knowledge (as measured by adult literacy and combined primary, secondary, tertiary gross enrollment ratio); and standard of living (as measured by Gross Domestic Product per capita). United Nations Development Programme, *FAQs on the Human Development Indices, at* <http://hdr.undp.org/statistics/faq.cfm#1>.

[52] *CCPR Commentary, supra*, ¶ 19, at 37.

[53] CAT, *supra*, art. 12.

[54] *Id.* art. 14.

components of a functioning central government – such as national law enforcement and judicial institutions – states cannot provide an effective domestic remedy even for such grave human rights violations.

2. Somalia Lacks a Functioning or Reliable Legal System

In Somalia, there is presently no rule of law, no national justice system, and in southern and central Somalia, no courts at all.[55] The only option for many Somalis who wish to resolve a dispute or to seek a remedy for abuse without seizing a weapon is to consult clan elders, who often favor blood compensation. This *ad hoc* system cannot cope with the sheer scale of the crimes and abuses now occurring, especially where Somali militias have escaped the social control of clan elders.[56]

Islamic Sharia courts function in some areas in the north, dispensing sentences such as amputation, flogging, and execution that contradict human rights norms. Where local courts do function, judges typically lack legal training and base their rulings on a multiplicity of contradictory laws.[57] Members of the judiciary in the town of Kismayo told a visiting U.N. human rights expert in 2003 that they had no written copies of laws, so they rendered judgments based on what they remembered of the law.[58] The U.S. State Department reported earlier this year that, in the cities of Bosasso and Afmadow, "criminals [are] turned over to the families of their victims, who then [extract] blood compensation in keeping with local tradition."[59]

The few, disparate regional and local authorities in Somalia are incapable of preserving the rule of law or enforcing basic human rights guarantees. There are two quasi-governments operating in the Somaliland and Puntland regions, and the remnants of the TNG still control some

[55] The Danish Immigration Service, *supra*, at 28; *see also U.S. Country Reports on Human Rights: Somalia, supra*, at 1 (Somalia has no national justice system).

[56] The Danish Immigration Service, *supra*, at 28.

[57] *Id.* at 27.

[58] *Situation of Human Rights in Somalia (2003), supra*, at 10.

[59] *U.S. Country Reports on Human Rights: Somalia, supra*, at 3.

security forces.[60] However, the Somaliland, Puntland, and TNG authorities do not effectively provide remedies for human rights abuses; to the contrary, they are notorious for committing abuses themselves. The U.S. State Department has reported allegations of torture by the Somaliland and Puntland administrations,[61] and the Somaliland, Puntland, and TNG authorities have all been accused of using arrest and detention as weapons against political opponents and journalists.[62] Local police and security forces often use lethal force against civilians without just cause; in some cases, they have done so simply to stop vehicles.[63] As the UNHCR recently put it, "while the *de facto* authorities are accountable for the human rights situation in the areas they control, many are either not aware of or choose to ignore international conventions, or do not have the capacity to enforce respect for human rights and justice."[64]

Indeed, even the few Somalis charged with keeping the public order can become targets of violence and other abuses. For example, on June 21, 2003, the authorities in Somaliland detained General Jama Muhammad Ghalib, a former Minister of the Interior in Somalia, for allegedly advocating the formal reunification of Somaliland with Somalia.[65] On December 9, 2003, a police commander in the city of Hargeysa was murdered, reportedly for investigating a traffic accident.[66]

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[60] *See generally* International Crisis Group, *Biting the Somali Bullet* (2004).

[61] *U.S. Country Reports on Human Rights: Somalia*, *supra*, at 3.

[62] *Somalia: A Situation Analysis*, *supra*, at 36; *see also* Amnesty International, *Amnesty International Report 2003: Somalia* 2 (2003).

[63] Kenneth Menkhaus, "Warlords and Landlords: Non-State Actors and Humanitarian Norms in Somalia," *Conf., Liu Inst. Glob. Iss., Univ. B.C.* 1, 7 (2003).

[64] *Position on the Return of Rejected Asylum Seekers*, *supra*, at 2.

[65] *Situation of Human Rights in Somalia* (2003), *supra*, at 10.

[66] *Report of the Secretary General on the Situation in Somalia*, U.N. SCOR, U.N Doc. S/2004/115, at 5 (Feb. 12, 2004) (emphasis added) ("*Report of the Secretary General*").

In such conditions, Somalis cannot rely on even the most minimal degree of personal security nor hope that even basic human rights protections will be enforced.

As noted, Somalis returning from abroad face particular hardship and insecurity. In the absence of any centralized authority, an individual's main source of protection comes from his family or sub-clan. As the U.S. Secretary of Homeland Security stated, without the rule of law or state institutions, "Somalis within the country rely on family connections and collective security for survival," which makes "[n]ew arrivals, outside this network . . . extremely vulnerable."[67] Indeed, those returning from abroad often discover that members of their families and sub-clans have been displaced or killed, leaving them even more vulnerable to the rampant violence and lawlessness. As Amnesty International recently observed, "clan support mechanisms provide the only safety in the disintegrated state – but at the same time this fuels clan conflict and discrimination."[68] Thus, the absence of a functioning central government may make Somalia an even more dangerous place for those returning from abroad than for the already beleaguered and embattled population now living there.[69]

In short, Somalia's recent history demonstrates that human rights will not be respected where the absence of a functioning central government means those rights cannot be enforced. Moreover, the U.N. Security Council, of which the United States is a member, has consistently passed resolutions acknowledging that the situation in Somalia poses a threat to international peace and security. As discussed above, in light

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[67] Somalia TPS, *supra*, 68 Fed. Reg. at 43,138.

[68] Amnesty International, *Supporting and Strengthening the Work of Somali Human Rights Defenders – a Workshop Report* 2 (July 1, 2003).

[69] Somaliland declared independence from Somalia in 1991, but has failed to persuade any other country to recognize it. Even so, the Somaliland authorities regard Somalis from other parts of the country (or from abroad) as "foreigners," and issued a directive last September ordering the deportation from their territory of "illegal immigrants" – a class they define to include Somalis from the south. *Report of the Secretary General*, *supra*, at 6. New arrivals to Somaliland would thus face severe hardships and risks if deported there. *Position on Return of Rejected Asylum Seekers*, *supra*, at 6-7.

of the United States' commitment to fostering human rights law in a system that depends on the existence of functioning central governments for its enforcement, this Court should interpret 1231(b)(2) to prevent petitioner's removal to Somalia until it has such a government that accepts his return and can protect basic human rights throughout its territory.

IV. THE UNITED STATES' *NONREFOULEMENT* OBLIGATION UNDER THE ICCPR ALSO SUPPORTS INTERPRETING § 1231(b)(2) TO PREVENT PETITIONER'S RETURN TO SOMALIA

U.S. obligations under treaties and customary international law restrict its ability to remove aliens based on the potential harms they might face.[70] Under article 7 of the ICCPR, for example, the United States must first assess whether there is a real risk an alien would be exposed to torture or to cruel, inhuman, or degrading treatment or punishment before returning him to another country. The United States has not made this assessment in petitioner's case, even though it has recognized the atmosphere of lawlessness and widespread human rights abuses in Somalia and the particular dangers returnees face. Section 1231(b)(2) should thus be construed to prevent petitioner's deportation to Somalia until the U.S. has fulfilled its duty to determine that his return will not violate its *nonrefoulement* obligation under the ICCPR. *E.g.*, Implementation of Human Rights Treaties, Exec. Order No. 13,107, *supra*, 63 Fed. Reg. at 68,991 ("It shall be the policy and practice of the Government of the United States, being

[70] *See* Convention Relating to the Status of Refugees, art. 33, July 28, 1951, 189 U.N.T.S. 150 ("1951 Refugee Convention"); Protocol Relating to the Status of Refugees, art. 1, Jan. 13, 1967, 606 U.N.T.S. 267, entry into force by the United States (by accession) on Nov. 1, 1968 (obligating states parties to "apply articles 2 to 34 inclusive of the [1951 Refugee Convention]"); CAT, *supra*, art. 3(1); ICCPR, *supra*, art. 7; *see also* UNHCR, *The Scope and Content of the Principle of Non-Refoulement* (Opinion of Sir Elihu Lauterpacht & Daniel Bethlehem), ¶¶ 217-53 (2001) ("*Scope of Non-Refoulement*") (citing, *inter alia*, 1951 Refugee Convention (art. 33), CAT (art. 3), the European Convention (art. 3), and ICCPR (art. 7) as sources of *nonrefoulement* obligations under customary international law); *Ali*, 346 F.3d at 885-86 (recognizing United States' *nonrefoulement* obligations under customary international law as well as under ICCPR, CAT, and 1951 Refugee Convention).

committed to the protection and promotion of human rights and fundamental freedoms, fully to respect and implement its obligations under the international human rights treaties to which it is a party, *including the ICCPR* [and the Convention Against Torture . . . .") (emphasis added).[71]

The Human Rights Committee ("the Committee"), recognized as the authoritative body in interpreting the ICCPR,[72] including by U.S. courts,[73] instructs that "[s]tates parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement."[74] The Committee's jurisprudence further

[71] In ratifying the ICCPR, the United States declared articles 1-27 non-self-executing. U.S. Sen. Exec. Rep. 102-23 (102d Cong., 2d Sess. 1992), *reprinted in* 31 I.L.M. 645, 657 ("U.S. Sen. Exec. Rep.") (ICCPR does "not create a private cause of action" under the treaty). This declaration appears to be inconsistent with the purposes of the ICCPR and the Supremacy Clause. U.S. Const. art. VI, cl. 2; *see United States v. Duarte-Acero*, 208 F.3d 1282, 1284 (11th Cir. 2000). Moreover, whether or not the ICCPR is self-executing need not be decided here since it is being invoked defensively and not to create a private cause of action. *Cf. United States v. Duarte-Acero*, 132 F. Supp. 2d 1036, 1040 n.8 (S.D. Fla. 2001) (declaration does not apply when raising "ICCPR claims defensively").

[72] The Human Rights Committee is the body established by Article 40 of the ICCPR to monitor and interpret state compliance with that treaty, and is authorized to issue "such general comments as it may consider appropriate." ICCPR, *supra*, art. 40(4). Those general comments are addressed to all states parties and are intended, among other things, "to draw the attention of the States parties to matters relating to the improvement of . . . the implementation of the Covenant" and to "stimulate activities of States parties . . . in the promotion and protection of human rights." U.N. H.R. Comm., *Statement on the Duties of the Human Rights Committee under article 40 of the Covenant*, Decision of the Committee of 30 Oct. 1980, U.N. Doc. CCPR/C/18; A/36/40, *reproduced in CCPR Commentary*, *supra*, Appendix at 845. Thus, such comments are an important interpretive guide to a state party's obligations under the treaty.

[73] *Duarte-Acero*, 208 F.3d at 1285 n.12; *see also United States v. Bakeas*, 987 F. Supp. 44, 46 n.4 (D. Mass. 1997).

[74] U.N. H.R. Comm., *General Comment 20, Article 7*, 44th Sess., U.N. Doc. HRI\GEN\1\Rev.1, at 30, ¶ 9 (1994) ("General Comment 20"); *see also* U.N. H.R. Comm., *General Comment No. 31 on Article 2 of the Covenant: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, 80th Sess., U.N. Doc. CCPR/C/74/CRP.4/Rev.6, ¶ 12 (2004) (reiterating *nonrefoulement* obligation under ICCPR).

explains that under the ICCPR states parties must assess whether deportation would expose a person to "a real risk" of the harms prohibited by article 7.[75] States parties must therefore "ensure that they carry out their other legal commitments, whether under domestic law or under agreements with other states, in a manner consistent with [the ICCPR]."[76] Moreover, article 7 is non-derogable and permits no exception, in contrast to other provisions of the ICCPR that allow states parties to derogate from their obligations in "time of public emergency which threatens the life of the nation." ICCPR, *supra*, art. 4(1).

The ICCPR's *nonrefoulement* obligation has also been recognized by other countries. The Supreme Court of Canada, for example, has determined that article 7 forecloses a state from expelling a person to a place where he will face harms prohibited under the treaty.[77] The Australian government has similarly stated that the ICCPR imposes an "implicit" duty of *nonrefoulement* where "as a necessary or foreseeable consequence of [a person's] removal or deportation from Australia, the person would face a real risk of violation of his or her rights under Article 6 (right to life), or Article 7 (freedom from torture or cruel, inhuman or degrading treatment or punishment) of the ICCPR."[78] Analogous provisions of regional human rights treaties likewise prohibit *refoulement* based on a risk of torture or inhuman or degrading treatment or punishment.[79]

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[75] *A.R.J. v. Australia*, Views of the H.R. Comm. under art. 5, ¶ 4 of the Optional Protocol to the ICCPR, Comm. No. 692/1996, 60th Sess., U.N. Doc. CCPR/C/60/D/692/1996, ¶ 6.8 (1997).

[76] *Id.*; *see also T. v. Australia*, Views of the H.R. Comm. under art. 5, ¶ 4 of the Optional Protocol to the ICCPR, Comm. No. 706/1996, 61st Sess., U.N. Doc. CCPR/C/61/D/706/1996, ¶ 8.1 (1997).

[77] *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 S.C.R. No. 3, ¶ 67 (Can. 2002) (reading article 7 with General Comment 20 of Human Rights Committee).

[78] *Akpata v. Minister for Immigration*, 2004 FCAFC 65, ¶¶ 32, 39 (Fed. Ct. Aust. 2004) (citing Minister for Immigration Direction No. 21, *Direction under Section 449 - Visa Refusal and Cancellation Under Section 501 of the Migration Act 1958*, Aug. 23, 2001, ¶¶ 2.18-2.21).

[79] *See, e.g., Chahal v. United Kingdom*, 23 Eur. H.R. Rep. 413 (1991) (under European Convention on Human Rights, art. 3, prohibiting return to India

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In this case, the United States has not assessed whether petitioner could face a real risk of torture or cruel, inhuman, or degrading treatment or punishment under the ICCPR – a critical inquiry given the current circumstances in Somalia. *Amici* recognize that petitioner was found ineligible for relief under the Refugee Convention because of his criminal conviction,[80] and that his claim under the Convention Against Torture was rejected by the immigration court and not challenged in his habeas action.[81] However, the United States' *nonrefoulement* obligation under the ICCPR is different in substance and scope than its obligations under the Refugee Convention and CAT. Specifically, *nonrefoulement* under the Refugee Convention is limited to those who meet the definition of a "refugee"[82] and who also are not subject to an independent bar, for example, based upon conviction of "a particularly serious crime."[83] By contrast, *nonrefoulement* under the ICCPR

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of Sikh activist, found deportable as threat to national security, based on risk of ill-treatment by Indian authorities); *see also Modise v. Botswana*, African Comm. Hum. & Peoples' Rights, Comm. No. 97/93, 21st Sess. (not dated), *available at* <http://www1.umn.edu/humanrts/africa/comcases/97-93b.html> (under African Charter on Human and Peoples' Rights, holding that alien's deportation forcing him to live in uninhabited strip of "no-man's land" land between Botswana and South Africa for prolonged period of time without shelter constituted inhuman or degrading treatment that offended the "dignity of a human being").

[80] The immigration judge found petitioner ineligible for withholding of removal based on his conviction of third degree assault, which the judge determined to be "a particularly serious crime" under 8 U.S.C. § 1231(b)(3)(B)(ii). Decision of the Immigration Judge, 8th Cir. Joint Appendix at 21-23. Respondent submitted a Joint Appendix in its appeal to the 8th Circuit (hereinafter "8th Cir. J.A.").

[81] *But see infra* notes 98-99.

[82] 1951 Refugee Convention, *supra*, art. 33(1) (prohibiting states parties from deporting an individual whose life or freedom would be threatened on ground of race, religion, nationality, political opinion, or membership in particular social group).

[83] *Id.* art. 33(2) (*nonrefoulement* obligation inapplicable where individual, "having been convicted . . . of a particularly serious crime, constitutes a danger to the community of that country"). Although the immigration judge's conclusion that petitioner's third degree assault constituted "a particularly serious crime" is not before this Court, *amici*

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is not predicated on the status or conduct of an individual,[84] but instead applies to all persons.

While CAT imposes an absolute duty of *nonrefoulement* where there are "substantial grounds for believing [an individual] would be in danger of being subjected to torture,"[85] it is more limited in scope than the ICCPR. The text of CAT restricts the definition of torture to acts "inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity,"[86] and thus has not generally been understood to reach private conduct. In contrast, the Human Rights Committee instructs that a state has a positive "duty [under the ICCPR] . . . to afford everyone with protection through legislative and other measures as may be necessary against the acts prohibited by article 7, whether inflicted by people acting in their official capacity, outside their official capacity or in a *private capacity*."[87] Indeed, the Committee has explicitly acknowledged the importance of protecting against "private assaults on bodily integrity and dignity."[88]

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believe that this determination was inconsistent with international jurisprudence. *E.g.*, *Scope of Non-Refoulement*, *supra*, ¶ 186 (construing particularly serious crime more narrowly to include "murder, rape, armed robbery, arson"); *see also id.* ¶ 191-92 (construing "danger" more narrowly to mean "very serious danger" and "as a reference to the safety and well-being of the population in general").

[84] *Scope of Non-Refoulement*, *supra*, ¶ 240; *see also* General Comment 20, *supra*, ¶ 2 (purpose of ICCPR article 7 is to protect "the dignity and the physical and mental integrity of the *individual*") (emphasis added).

[85] CAT, *supra*, art. 3(1) (obligating states parties not to "expel, return ("*refouler*") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture").

[86] *Id.* art. 1(1).

[87] General Comment 20, *supra*, ¶ 2 (emphasis added); *see also* General Comment 31, *supra*, ¶ 8 (recognizing that article 7 "implicitly" obligates states parties "to take positive measures to ensure private persons or entities do not inflict torture, or cruel, inhuman or degrading treatment or punishment on others within their power").

[88] Sarah Joseph et al., *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary* 149 (2000) (internal quotation marks omitted).

Also, article 3 of CAT expressly forbids *refoulement* based on fear of torture,[89] and does not reach lesser forms of "impugned treatment."[90] The ICCPR, by contrast, prohibits *refoulement* based on the scope of *all* article 7 treatment – not only torture, but also cruel, inhuman, or degrading treatment or punishment.[91] The ICCPR does not precisely define these terms.[92] And although the Human Rights Committee has not considered it "necessary to establish sharp distinctions between the different kinds of punishment or treatment," it has stated that "the distinctions depend on the nature, purpose and severity of the treatment applied."[93] The Committee has also made clear that the prohibition against torture or cruel, inhuman, or degrading treatment or punishment under article 7 extends "not only to acts that cause physical pain but also to acts that cause mental suffering to the victim."[94] Moreover,

[89] CAT, *supra*, art. 3(1).

[90] Joseph, *supra*, at 162.

[91] General Comment 20, *supra*, at ¶ 2.

[92] The United States has made a reservation to article 7 of the ICCPR, noting that it "considers itself bound to article 7 to the extent that 'cruel, inhuman or degrading treatment' means the cruel and unusual treatment or punishment prohibited by the Fifth, Eighth and/or Fourteenth Amendment" to the U.S. Constitution. U.S. Sen. Exec. Rep., *supra*, 31 I.L.M. at 654. The Human Rights Committee found the U.S. reservation to Article 7 to be incompatible with the treaty's object and purpose. U.N. H.R. Comm., *Concluding Observations of the Human Rights Committee: United States of America*, 53rd Sess., U.N. Doc. CCPR/C/79/Add.50; A/50/40, ¶ 279 (1995). *Amici* agree with this analysis, and believe that the United States' attempt to narrow the treaty's scope is incompatible with its goal of preventing a wide range of human rights abuses. *See also* U.N. H.R. Comm., *General Comment No. 24 (52)*, 52nd Sess., U.N. Doc. CCPR/C/21/Rev.1/Add.6 (1994), ¶ 8 ("provisions in the [ICCPR] that represent customary international law (and a fortiori when they have the character of peremptory norms) may not be the subject of reservations. Accordingly, a State may not reserve the right to engage in . . . torture, to subject persons to cruel, inhuman or degrading treatment or punishment . . . .").

[93] General Comment 20, *supra*, ¶ 4.

[94] *Id.* ¶ 5; *see Vuolanne v. Finland*, Views of the H.R. Comm. under art. 5, ¶ 4 of the Optional Protocol to the ICCPR, Comm. No. 265/1987, 35th Sess., U.N. Doc. CCPR/C/35/D/265/1987, ¶ 9.2 (1989) (determination of
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the Committee has instructed that the prohibition in article 7 is applicable in instances where people are "deprived of their liberty."[95]

In interpreting article 3 of the European Convention on Human Rights and Fundamental Freedoms, an analogous provision to article 7 of the ICCPR,[96] the European Court of Human Rights stated that the distinction between "torture" and "inhuman or degrading treatment" relates principally to the intensity of suffering inflicted. *Ireland v. United Kingdom*, 25 Eur. H.R. Rep. 25, 26 (1979). Specifically, the court emphasized that the assessment of ill treatment under article 3 of the European Convention is relative, and depends upon "all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim." *Id.* at 79. It considered "[i]nhuman" treatment to be anything that causes "if not actual bodily injury, at least intense physical and mental suffering to the persons subjected thereto," *id.* at 79-80, and "[d]egrading" treatment to be anything that "arouse(s) in . . . victims feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking down their physical or moral resistance." *Id.* at 80. "Torture," in contrast, constitutes an "aggravated form of inhuman treatment causing intense physical and/or mental suffering." *Id.* at 109.

These distinctions are important in assessing a country's *nonrefoulement* obligations. For example, in *C. v. Australia*, Views of the H.R. Comm. under art. 5, ¶ 4 of the Optional Protocol to the ICCPR, Comm. No. 900/1999, 76th Sess., U.N. Doc. CCPR/C/76/D/900/1999, ¶ 10 (2002), the Human Rights Committee barred the deportation of a alien to Iran based on

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whether treatment violated article 7 is subjective evaluation, based upon such factors as duration and manner of treatment, treatment's physical or mental effects, and sex, age, and victim's state of health).

[95] General Comment 20, *supra*, ¶ 2 (citing ICCPR, *supra*, art. 10(1), which requires that such persons be treated "with humanity and with respect for the inherent dignity of the human person").

[96] The only difference between the two provisions is that article 7 of the ICCPR adds the term "cruel" to the conduct prohibited.

its conclusion that the applicant's rights under ICCPR article 7 would be violated if he were returned there. Although he had previously been granted refugee status, the applicant was ordered deported based upon a criminal conviction. *Id.* ¶¶ 2.6-2.8. He appealed, arguing, *inter alia*, that returning him to Iran would "expose him to a real risk" of torture or of cruel, inhuman or degrading treatment or punishment in violation of article 7 of the ICCPR. *Id.* ¶ 3.2. The Committee observed that the applicant's psychiatric illness had been "triggered" by his "protracted . . . immigration detention" in Australia. *Id.* ¶ 8.4. It concluded that because it was "unlikely" he "would receive treatment necessary for the illness" in Iran, his removal there would violate Australia's *nonrefoulement* obligation under article 7.

In *Ahmed v. Austria*, 24 Eur. H.R. Rep. 278 (1996), the European Court of Human Rights construed an analogous provision to article 7 of the ICCPR to block Austria's decision to return an alien to Somalia even though his refugee status had been revoked based upon a criminal conviction. The court rejected Austria's argument that, because the applicant feared persecution by non-state actors, he was outside the scope of article 3 of the European Convention, which prohibits torture or inhuman or degrading treatment or punishment. *Id.* at 279, 291. It further determined that Austria was obligated to consider the consequence of his expulsion to Somalia. *Id.* at 291. In rejecting Austria's argument that the applicant would not face ill treatment upon his return, the court concluded that "[i]t is sufficient that those who hold substantial power within the State, even though they are not the Government, [could] threaten the life and security of the applicant." *Id.* at 289. Specifically, the court found that Somalia "was still in a state of civil war and [that] fighting was going on between a number of clans vying with each other for control of the country . . . and [t]here was no indication that the dangers to which the applicant would have [previously] been exposed . . . had ceased to exist or that any public authority would be able to protect him." *Id.* at 291. The court thus concluded that the applicant's deportation to Somalia would breach article 3 "for as long as he face[d] a serious risk of being subjected there to torture or

inhuman or degrading treatment." *Id.* at 292. And while the court acknowledged Austria's interest in expelling aliens who commit crimes, it stated that this interest was subordinate to the absolute prohibition of article 3, "which enshrines one of the fundamental values of democratic societies." *Id.* at 290

Finally, there is also a serious question whether returning petitioner to Somalia under the current circumstances would violate the United States' obligation under CAT.[97] First, the immigration judge denied petitioner's claim for relief under CAT because he did not find it "more likely than not" that he would be subjected to torture "by any governmental group or by a person acting in any official capacity." 8th Cir. J.A. at 24-25. This assessment apparently did not take into account international jurisprudence concerning the risk of torture in a state without a functioning central government, like Somalia, where private individuals who exercise government functions can effectively become "public official[s] or other person[s] acting in an official capacity."[98] Second, the immigration judge rejected petitioner's CAT claim based upon petitioner's return to northern Somalia, which the judge concluded was more secure because petitioner's sub-clan "appear[ed]" to have control of that area. 8th Cir. J.A. at 24. But in seeking to effect the removal order, the United States altered the destination to Hargeysa in Somaliland,[99] an area controlled by a different

[97] Although petitioner did not raise his CAT claim in his habeas petition, the United States must still comply with its obligations under the ratified treaty. *Cf.* Exec. Order No. 13,107, *supra*, 63 Fed. Reg. 68,991.

[98] *See Elmi v. Australia*, Views of the Comm. Against Torture, under art. 22 of CAT, Comm. No. 120/1998, 22nd Sess., U.N. Doc. CAT/C/22/D/120/1998, ¶ 6.5 (1999) (blocking applicant's deportation to Somalia). In *Elmi*, the CAT committee, the authoritative body interpreting that treaty, CAT, *supra*, art. 17, rejected Australia's argument that the applicant's fear of torture by members of Somali clans was outside the definition of torture under article 1. *Id.* at ¶ 4.8.

[99] *Jama v. Ashcroft*, No. Civ. 01-1172, 2004 WL 67658, at *5 n.15 (D. Minn. Jan. 14, 2004) (citing transcript from Oct. 26, 2003 telephone conference between parties and district judge, in which petitioner "expressed his conviction that he would be killed if he was returned to Hargeysa, in Somaliland, where the government indicated he would be deported"), *rev'd on other grounds*, 362 F.3d 1117 (8th Cir. 2004).

clan than petitioner's, and an area arguably more dangerous for him – a critical change in a country which lacks a functioning central government to enforce human rights protections throughout its territory.

In sum, under the ICCPR the United States must ensure it will not expose a person to a real risk of torture or of cruel, inhuman, or degrading treatment before deporting him to another country. The United States' failure to meet this obligation is particularly concerning, given Somalia's lack of a functioning central government, atmosphere of lawlessness, ongoing armed conflict among rival clans, and widespread human rights abuses. Moreover, with the clan and family now offering Somalis the main source of protection, returnees face particular dangers, especially those like petitioner, who was previously admitted to the United States as a refugee after fleeing Somalia in 1991 at the age of 12, *see* 8th Cir. J.A. at 8, 10, 30, and who does not know if family members remain in the country. 8th Cir. J.A. at 10. As the Secretary of Homeland Security has himself acknowledged, "[n]ew arrivals outside this [traditional family] network, would be extremely vulnerable," and that returning persons to Somalia in the current circumstances "would pose a serious threat to their personal safety."[100] Accordingly, § 1231(b)(2) should be construed to prevent the petitioner's return to Somalia until the United States has determined that it will not violate its *nonrefoulement* obligation under the ICCPR.

[100] Somalia TPS, *supra*, 68 Fed. Reg. at 43,148.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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